

Supreme Court, U.S.  
FILED

JUL 18 1990

JOSEPH F. SPANIOL, JR.  
CLERK

No. 89-2011

In The  
**Supreme Court of the United States**  
October Term, 1989

CITY VENDING OF MUSKOGEE, INC.,  
*Petitioner,*

v.

OKLAHOMA TAX COMMISSION,  
*Respondent.*

**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit**

**RESPONDENT'S BRIEF IN OPPOSITION**

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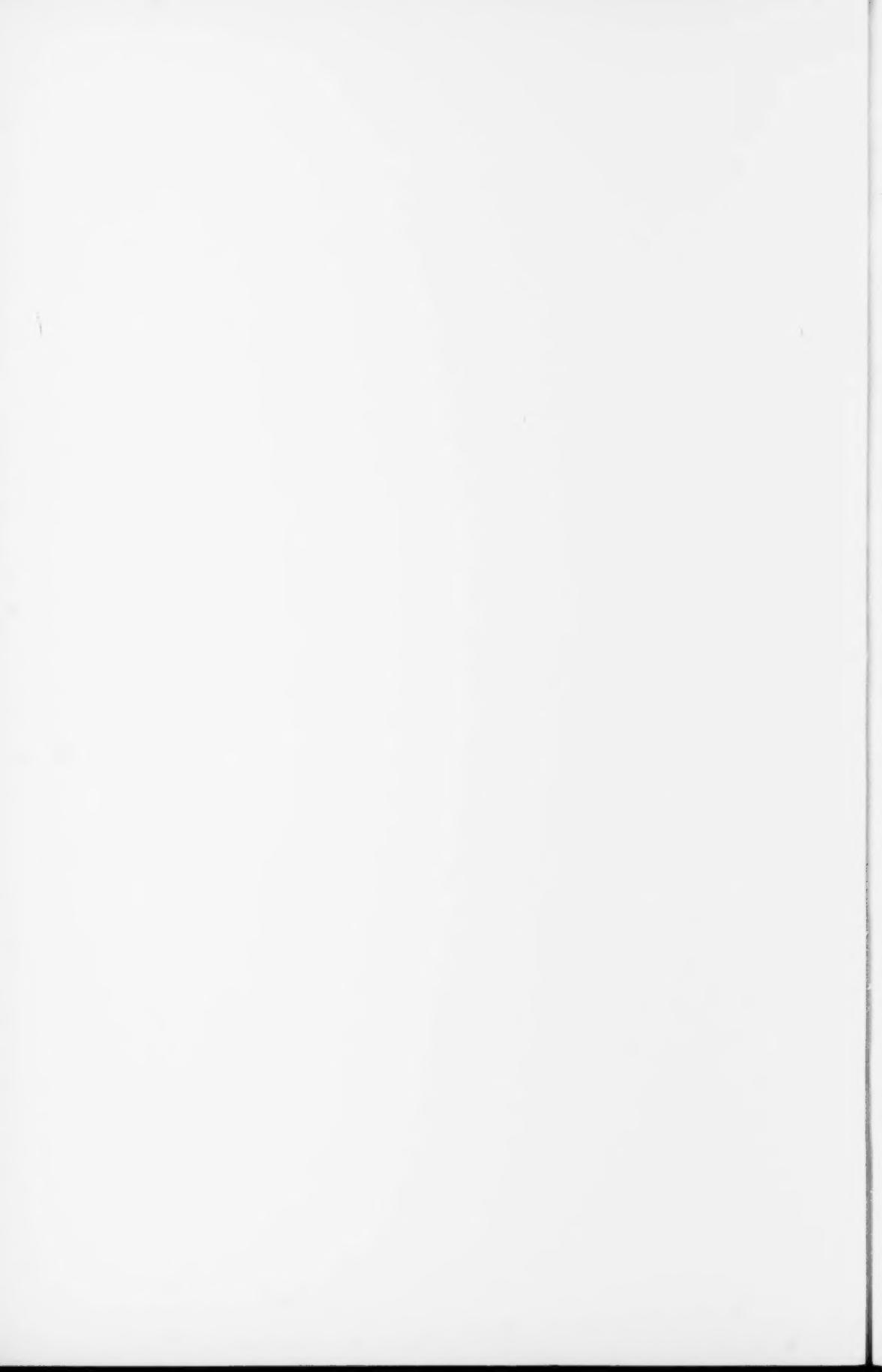
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July, 1990

**BEST AVAILABLE COPY**

## **QUESTIONS PRESENTED**

1. Whether the district court was precluded from hearing petitioner's claims, asserted in an adversary proceeding in bankruptcy, challenging two final tax assessments on the sale of unstamped cigarettes, where petitioner had protested the assessments, received a full hearing before the Oklahoma Tax Commission and allowed the Commission's determination to become final by failing to appeal to the Oklahoma Supreme Court, all prior to the commencement of the bankruptcy case.
2. Whether the action sought to be reviewed has been rendered moot by the bankruptcy court's subsequent dismissal of the underlying bankruptcy case.



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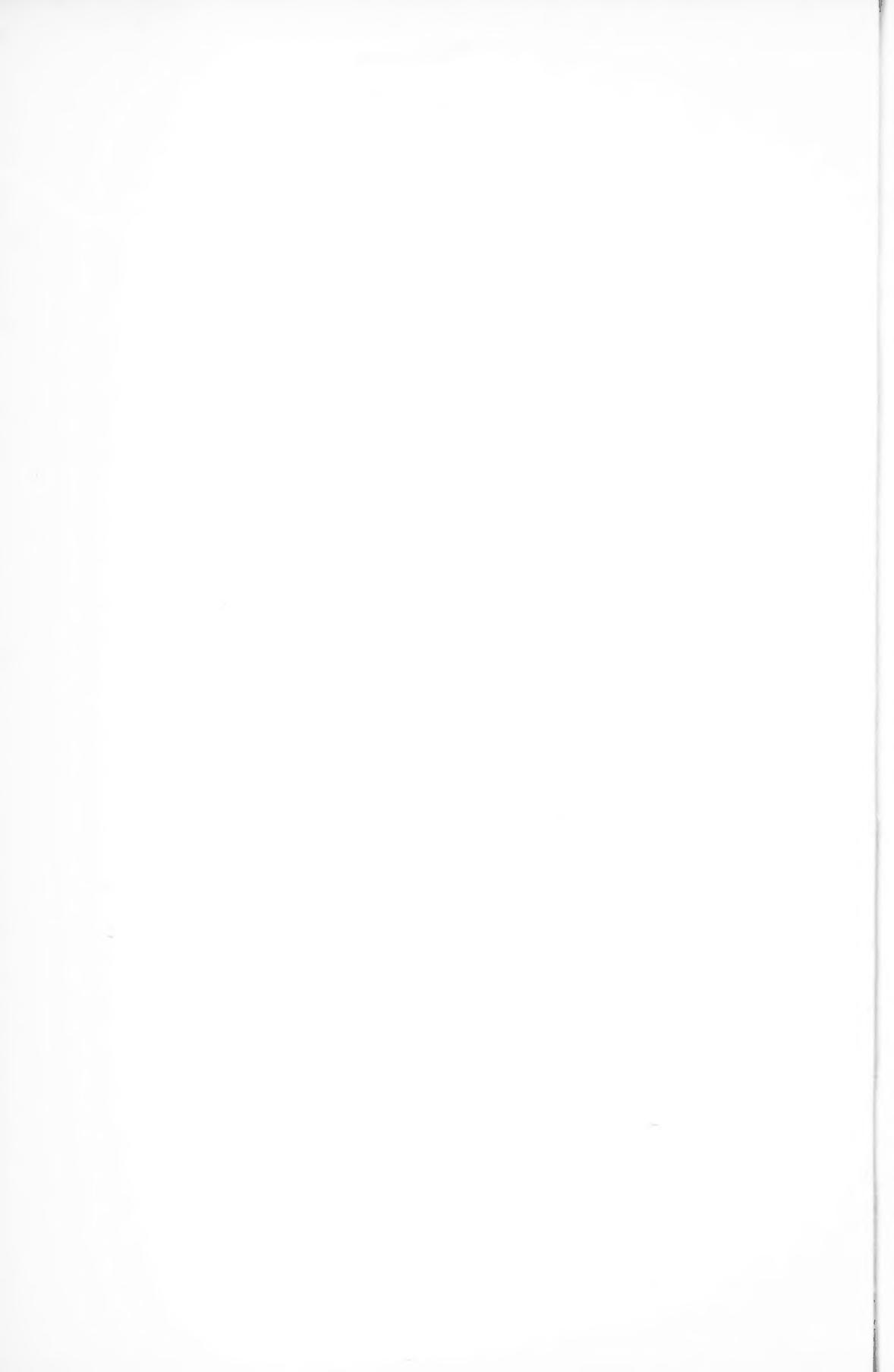
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CITY VENDING OF MUSKOGEE, INC.,  
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OKLAHOMA TAX COMMISSION,  
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**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit**

---

**BRIEF OF RESPONDENT IN OPPOSITION  
TO WRIT OF CERTIORARI**

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**OPINIONS AND ORDERS BELOW**

In addition to those orders and opinions included in the Petition for Writ of Certiorari, an order was entered in the United States Bankruptcy Court for the Eastern District of Oklahoma on June 19, 1990, dismissing bankruptcy case number 86-71016, under which the instant adversary proceeding arose. That order, which is unreported, is reproduced in the appendix to this brief as Appendix A.

**STATUTES INVOLVED**

Bankruptcy Code §505 (11 U.S.C.) in pertinent part provides:

**§505. Determination of tax liability.**

(a)(1) Except as provided in paragraph (2) of this subsection,

the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The Court may not so determine—

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title;

\* \* \* \*

The Tax Injunction Act, 28 U.S.C. §1341, provides:

**§1341. Taxes by States**

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The relevant Oklahoma tax procedure statutes, Okla. Stat. tit. 68, §§201, 207, 221, 225 and 226, (1981) are set forth in Appendix B to this brief.

**STATEMENT OF THE CASE**

Respondent, Oklahoma Tax Commission ("Commission"), proposed two assessments of tax, penalty and interest upon the sale within the state of un stamped cigarettes, against petitioner, an Oklahoma corporation engaged in business as a wholesale cigarette dealer. The first assessment, on or about May 31, 1985, was in the approximate amount of \$85,000. Petitioner filed a timely protest to this assessment and requested a hearing thereon before the Commission pursuant to Okla. Stat. tit. 68, §221 (1981).

As a defense to the proposed assessment, petitioner claimed in its protest and at the hearing that the cigarettes had been sold to Indian tribes for resale in tribally-owned "smokeshops," and that the sales were therefore exempt from state taxation under the interstate commerce clause of the United States Constitution. After a full hearing the Commission ruled that, as an administrative agency, it lacked authority to determine petitioner's constitutional claim, but also concluded that it had jurisdiction of the subject matter of the protest, and under provisions of state law, petitioner's protest should be denied. The Commission then denied petitioner's protest and upheld the assessment. (Order No. 85-10-22-40, Pet. for Cert. at App. 17-25).

Petitioner gave notice of intent to appeal the Commission's determination to the Oklahoma Supreme Court, as authorized by Okla. Stat. tit. 68, §225 (1981), and also paid, under protest, the amount of the affirmed assessment (a jurisdictional prerequisite to appeal under §225).

But, petitioner did not perfect the appeal. No petition in error was ever filed with the Oklahoma Supreme Court. Instead, petitioner filed an action in federal district court for a refund of the taxes paid and for declaratory relief. Commission moved to dismiss the federal action pursuant to 28 U.S.C. §1341 and, when petitioner failed to respond to the motion, the case was dismissed.

While the Commission's motion to dismiss the federal court action was pending, petitioner filed an essentially identical action in state district court seeking relief under Okla. Stat. tit. 68, §226 (1981), which specifically provides a right of action to challenge a tax assessment on constitutional grounds. This action was not filed within the time limits prescribed by that section, however, and state court jurisdiction was subsequently prohibited by the Oklahoma Supreme Court.

Meanwhile, no appeal having been taken from the Commission's determination, that order became final thirty days after its rendition (Okla. Stat. tit. 68, §221(g)), on or about November 22, 1985.

Petitioner continued to sell unstamped cigarettes and, on March 19, 1986, the Commission proposed a second assessment, in the approximate amount of \$1,400,000. Petitioner filed an application with the Oklahoma Supreme Court requesting that court to assume original jurisdiction over the matter, which application was subsequently denied. Petitioner also filed, as it had to the first assessment, a protest before the Commission, asserting the same commerce clause defense. This time, however, although entitled to do so, petitioner did not request a hearing, and elected to have the protest considered on the pleadings, as authorized by Okla. Stat. tit. 68, §221(d).

Sitting *en banc*, the Commission upheld the second assessment, this time addressing petitioner's constitutional claims. The Commission ruled that "even assuming that the cigarette sales . . . proposed to be [taxed] were first sold to Indian tribes for resale by such tribes, such fact standing alone does not exempt such sales from the operation of this State's cigarette tax laws." (Order No. 86-05-13-02, Pet. for Cert. at App. 15). No appeal was taken or attempted from this ruling, and it became final thirty days later on June 12, 1986.

In October, 1986, after both of the Commission's rulings had become final without appeal, petitioner filed a voluntary petition in the Eastern District of Oklahoma for relief under Chapter 11 of the Bankruptcy Code. The following February petitioner commenced an adversary proceeding against the Commission, seeking a declaratory judgment invalidating both prior assessments, and a return of monies paid on the first assessment. After initially denying the Commission's motion to dismiss the action under Bankruptcy Code §505, the bankruptcy judge determined *sua sponte* that the matter was not a core proceeding and abstained from proceeding further. The case was then transferred to the district court.

The district court determined that it lacked subject matter jurisdiction to hear petitioner's claim because of the preclusive provisions of 28 U.S.C. §1341, and dismissed the case. On appeal, the Tenth Circuit observed that, while §1341 would preclude the district court from considering petitioner's claims in the ordinary case, the bringing of this action in the context of bankruptcy proceedings required a juris-

dictional analysis under the provisions of Bankruptcy Code §505.

The Court of Appeals made that analysis and found from the undisputed facts in the record that petitioner had actively contested both assessments before the Commission, and then failed to appeal the Commission's rulings to the Oklahoma Supreme Court as authorized by state law. The court determined that the Commission's rulings were within the Commission's authority to make, and that they had become final under state law prior to the commencement of the bankruptcy case. The Court of Appeals thus concluded that, under the provisions of 11 U.S.C. §505(a)(2)(A), the district court was correct in determining it lacked jurisdiction to consider petitioner's claims, and affirmed the judgment of dismissal.

Petitioner seeks review of the Court of Appeals' decision.

### **SUMMARY OF ARGUMENT**

Review by certiorari in this case is both unnecessary and inappropriate for two reasons.

At the outset, respondent suggests that the dismissal of the underlying bankruptcy case, subsequent to the entry of the opinion and judgment of the Court of Appeals, renders the issues and claims sought to be reached in the adversary proceeding moot. Even were the issues in this case wrongly decided, which they were not, neither the bankruptcy court nor the district court, sitting in bankruptcy or otherwise, would now have jurisdiction to relitigate the state tribunal's final determination of tax liability. A decision by this Court would not result in the granting of any relief.

Secondly, the decision below was abundantly correct. The Court of Appeals followed and applied clear statutory law to admitted and undisputed facts, and arrived at the obvious and statutorily mandated conclusion—that the district court was without jurisdiction to consider or relitigate two state tax assessments which, prior to bankruptcy, had been actively contested before and finally adjudicated by the state tribunal authorized by statute to determine such protests.

The facts of the case are simple. Petitioner was assessed taxes for selling unstamped cigarettes. Petitioner filed protests of those assessments with the Commission, which is authorized by state law to hear such protests. Petitioner sought and received a full hearing, actively contested the assessments, and lost. Petitioner had the right to full judicial review of that decision by direct appeal to the Oklahoma Supreme Court, and even took preliminary steps to that end. But petitioner did not follow through. Instead of perfecting an appeal, petitioner abandoned its right of review and began a litigational odyssey — first in federal court (where petitioner again abandoned its efforts), then in state district court (untimely), and finally, over a year after the Commission's first adjudication had become final, in bankruptcy court.

The Court of Appeals correctly concluded that the federal courts lacked jurisdiction in such a case to relitigate those assessments. Its opinion conforms to applicable decisions of this Court, and certiorari should be denied.

## ARGUMENT

### I

#### **THE TAX CHALLENGES, ASSERTED BY THE PETITIONER IN AN ADVERSARY PROCEEDING IN BANKRUPTCY, WERE RENDERED MOOT BY THE SUBSEQUENT DISMISSAL OF THE UNDERLYING BANKRUPTCY CASE.**

This case arose when petitioner filed an adversary proceeding in bankruptcy to challenge two prior state tax assessments. The district court dismissed for lack of jurisdiction and the Court of Appeals affirmed.

Thereafter, the bankruptcy court, upon review of a status report by debtor's "last known counsel," found that "the lack of participation in this bankruptcy proceeding by the Debtor-in-Possession has imposed an 'unreasonable delay by the debtor that is prejudicial to creditors,'" that the debtor had "failed to propose a Plan within the

time prescribed" by the bankruptcy court and had "demonstrated an inability to effectuate a Plan." The bankruptcy judge then dismissed the bankruptcy case, without reserving jurisdiction over the adversary proceeding or any other matter. (Order, Appendix A).

With the dismissal of the underlying bankruptcy case, petitioner's complaint for a determination by that court of the legality of the prior tax assessments became moot. *See, Gardens of Cortez v. John Hancock Mutual Life Ins. Co. (In re Gardens of Cortez)*, 585 F.2d 975, 978 (10th Cir. 1978); *See also*, 2 Collier on Bankruptcy, ¶349.03 (15th ed. 1989) at 349-10, 11. While 11 U.S.C. §505 authorizes a bankruptcy court to determine the tax liability of a debtor in certain circumstances, the bankruptcy court has no jurisdiction to make such a determination *after* its dismissal of the bankruptcy case. *In re Solar Equipment Corp.*, 19 Bankr. 1010, 1012 (D.C.W.D. La. 1982). There is no longer a bankruptcy case in which, or related to which, a determination authorized solely by the Bankruptcy Code could be made. *Id.*, at 1012.

Without the context of bankruptcy proceedings, the district court would likewise be precluded from hearing petitioner's complaint, by the provisions of 28 U.S.C. §1341. Oklahoma's statutory remedies for challenging the State's tax laws have more than once been examined by the federal courts, and have been found to satisfy the requirements of a "plain, speedy and efficient remedy," so as to preclude the federal courts from considering actions to "enjoin, suspend or restrain the assessment, levy or collection" of taxes under the laws of this State. *See, Cities Service Gas Co. v. Oklahoma Tax Commission*, 656 F.2d 584, 587 (10th Cir. 1981), cert. denied, 454 U.S. 1124 (1981); *See also, Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986) ("for purposes of Section 1341, Oklahoma provides an adequate remedy to challenge the lawfulness of its taxing policies and practices under the Oklahoma Cigarette Tax Act").

Under these circumstances it is thus clear that there now exists no federal forum with jurisdiction to consider petitioner's tax challenges, or to grant any effective relief. Petitioner's claims are therefore moot, and further review by this Court is not warranted.

THE CHALLENGED TAX ASSESSMENTS WERE CONTESTED BEFORE AND ADJUDICATED BY AN ADMINISTRATIVE TRIBUNAL OF COMPETENT JURISDICTION PRIOR TO THE COMMENCEMENT OF THE BANKRUPTCY CASE, AND THE COURT OF APPEALS CORRECTLY AFFIRMED THE LOWER COURT'S DETERMINATION THAT IT LACKED JURISDICTION TO RELITIGATE THOSE CLAIMS.

The district court dismissed petitioner's complaint for lack of jurisdiction, pursuant to the provisions of 28 U.S.C. §1341. The Court of Appeals, while agreeing that in the ordinary case §1341 would prohibit federal court consideration of petitioner's claim, the circumstance that the claim was brought in the context of a bankruptcy proceeding required a jurisdictional analysis under the provisions of Bankruptcy Code §505 (11 U.S.C.). After making such an analysis and concluding that federal court jurisdiction was also barred under the Bankruptcy Code, the Court of Appeals affirmed. That decision was demonstrably correct and consistent with applicable decisions of this Court.

**A. The Oklahoma Tax Commission is an administrative tribunal of competent jurisdiction to hear and determine protests to proposed tax assessments.**

Oklahoma's Uniform Tax Procedure Code (the "Code"), Okla. Stat. tit. 68, §201 (1981) *et seq.*, establishes the remedies and procedures for challenging the State's tax laws and their enforcement. The Code specifically empowers the Tax Commission to hear and determine tax controversies. Okla. Stat. tit. 68, §§207, 221 (1981).

In a case where the Commission proposes to assess additional or delinquent taxes against a taxpayer, and the taxpayer complains that such assessment violates federal law or is unconstitutional, the Code provides the taxpayer with two remedies. First, the taxpayer may, without paying the proposed assessment, file a protest with the Commission, setting forth the nature of his protest and the legal basis

therefor. The taxpayer may request a hearing before the Commission and present argument and evidence in support of his protest. Following such hearing, the Commission enters its decision and order in regard to such protest, which order becomes final unless appealed within thirty days. Okla. Stat. tit. 68, §221 (1981). The taxpayer may appeal the Commission's decision directly to the Oklahoma Supreme Court. Okla. Stat. tit. 68, §225.

Secondly, where the taxes complained of are claimed to violate the Constitution or a provision of federal law, the taxpayer may, instead of filing his protest with the Commission, pay the taxes within thirty days of the proposed assessment and at the same time give notice to the Commission of his intent to file suit in the district court to recover those taxes. Okla. Stat. tit. 68, §226 (1981).

Petitioner in this case had an available remedy by administrative hearing under §221 (with the right of judicial review by direct appeal), and also a remedy by an action in district court under §226 (if timely pursued). Excepting that an action under §226 may not be maintained where a proposed assessment has been allowed to become final, nothing in either section makes its provisions applicable to proceedings under the other, *see Ladd Petroleum Corp. v. Oklahoma Tax Commission*, 619 P.2d 602, 604 (Okla. 1980); and nothing in either section requires that constitutional or federal law challenges be presented *only* in district court, or prohibits the Commission from hearing and ruling upon protests involving such claims.

Petitioner elected to have its protests heard by the Commission, as specifically authorized by statute, and actively contested the proposed assessments before that tribunal. Petitioner did not appeal the Commission's adverse decisions, although entitled to do so, and those rulings became final under state law prior to commencement of the bankruptcy case. The Commission's rulings were clearly within the statutorily granted powers of the Commission to make, and those determinations could not thereafter be relitigated by a federal court sitting in bankruptcy. *See, In re Northwest Beverage, Inc.*, 46 Bankr. 631 (Bankr. N.D. Ill. 1985); *see also, Arkansas Corporation Commission v. Thompson*, 313 U.S. 132 (1941).

Petitioner has never and does not now suggest that if it had appealed the Commission's decisions to the Oklahoma Supreme Court, as it was entitled to do, that that court could not or would not have fully considered and passed upon the Commerce Clause defense raised before the Commission. Petitioner's failure to avail itself of its right of appeal and full judicial review of all questions presented concludes the issue; and the federal courts, sitting later in bankruptcy, are precluded from rehearing the same. *Arkansas Corporation Commission, supra*, 313 U.S. at 144-45.

**B. The Commission's decisions, made in statutorily authorized tax contests, and which are reviewable by appeal to the Oklahoma Supreme Court, are not rendered void by the Commission's lack of authority to pass upon constitutional issues.**

Ultimately, petitioner argues that if the Commission is without authority to pass upon constitutional questions, then any ruling by the Commission in an administrative protest raising such questions as a defense to the assessment must necessarily be void. The cases cited by petitioner, however, do not support such a proposition, and the Court of Appeals correctly rejected this argument.

The Commission, as an administrative agency, is powerless to declare a statute unconstitutional, or to refuse to enforce a statute on such grounds in the absence of a determination to that effect by a court of competent jurisdiction. Unless and until the courts declare a statute unconstitutional or unenforceable, an administrative agency must presume the constitutional validity of the statutes it is mandated to enforce; and apply such statutes according to their terms. See, e.g., *Dow Jones & Co. v. State ex rel. Tax Com'n*, 787 P.2d 843, 845 (Okla. 1990). This is exactly what the Commission did in regard to its orders determining petitioner's tax protests.

In rejecting petitioner's argument that the Commission's rulings were void, the Court of Appeals correctly noted that, while decisions rendered *contrary to or in excess of* the tribunal's authority could be considered invalid, such was not the case here. As the court correctly

observed, the Commission "did not address the constitutional claims contrary to its authority, but rather held it lacked authority to consider those claims." (Emphasis supplied). The determination, therefore, was not void. *See generally V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224-25 (10th Cir. 1979). The answer to petitioner's argument as to the validity of the Commission's orders in these protests is simple: the Commission did not, as was the case in *Valley v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920), render a decision which was specifically prohibited to it by the very statute which conferred upon the Commission its authority to act. Here, the Commission rendered a decision it was specifically authorized to render, and scrupulously stayed within its authority in doing so. Okla. Stat. tit. 68, §221 (1981); *Dow Jones & Co., supra*. Having jurisdiction to make the determination it rendered, the Commission's order could not be collaterally impeached. *Windsor v. McVeigh*, 93 U.S. 274, 283 (1876).

There is little distinction, if any, between petitioner's claim here as to the validity of the Commission's rulings and the argument, rejected in *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107 (9th Cir. 1982), cert. denied, 455 U.S. 943 (1982), regarding the adequacy of state remedies for purposes of 28 U.S.C. §1341. There it was argued that, in order to obtain state court review of constitutional challenges under California law, a taxpayer must first exhaust its administrative remedies; and the California Constitution prevented state administrative agencies from passing on constitutional questions. Thus, the taxpayer argued, it was uncertain that taxpayer's constitutional claims could be fully adjudicated, and California's remedies were thus inadequate for federal purposes. The Ninth Circuit disagreed, observing that on appeal from an administrative agency determination the California courts could and would consider and rule upon all constitutional challenges and questions. The inability of such administrative agencies to declare state statutes unconstitutional or to refuse to enforce state statutes on constitutional grounds in the first instance, did not render the state-provided remedy inadequate. *Id.*, 681 F.2d at 1116-17.

The case is the same here. Petitioner had the right to appeal Commission's rulings directly to the Oklahoma Supreme Court, where all

constitutional issues could and would be fully considered and determined. That the petitioner elected not to pursue such an appeal does not affect the validity of the Commission's rulings. The Tenth Circuit correctly ruled that the Commission's orders were not void.

## CONCLUSION

This case is not, as petitioner claims, about Indian tribes or tribal sovereignty, or due process, or the Commerce Clause. It involves only the statutory jurisdiction of the federal courts to redetermine or relitigate a final state tax assessment that was previously contested before and adjudicated by the administrative tribunal authorized and empowered by Oklahoma law to hear and determine such contests — an adjudication that petitioner elected not to appeal.

The opinion below correctly affirmed, consistently with decisions in other circuits and in conformity with applicable decisions of this Court, that the federal courts lacked jurisdiction to hear such a case. No special reasons for further review have been advanced; a decision by this Court would neither materially contribute to, nor resolve any conflicts in, the body of constitutional or federal statutory law.

For these reasons, plus the fact that subsequent events (dismissal of the bankruptcy case) make it unlikely that further review would afford petitioner any effective relief, review by this Court is neither required nor warranted.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July, 1990

## APPENDIX A

FILED

June 19 1990

D. SUE ASHLEY, CLERK  
United States Bankruptcy Court  
Eastern District of Oklahoma

## IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

IN RE:	)
	)
CITY VENDING OF MUSKOGEE,	) Case No. 86-71016
INC.	) Chapter 11
EID 73-1120617	)
	)
Debtor.	)

## O R D E R

On this 18th day of June, 1990, the Status Report filed by counsel of record for the Debtor-in-Possession (Docket Entry No. 87) came before this Court for review.

After said review, this Court does hereby FIND:

1. This case was commenced by the Debtor through the filing of a Petition seeking relief under Chapter 11 of the United States Bankruptcy Code on October 19, 1986.
2. On December 18, 1987, the United States District Court for the Eastern District of Oklahoma entered a decision adverse to the Debtor. This ruling was ostensibly integral to the ability of the Debtor to reorganize. As a result, an appeal was taken to the United States Court of Appeals for the Tenth Circuit.

3. On March 14, 1990, the Tenth Circuit affirmed the decision of the District Court.

4. In response to the affirmation of the District Court ruling, this Court entered a Show Cause Order directing the Debtor to file a Chapter 11 Disclosure Statement and Plan no later than April 2, 1990 or appear on April 4 and show cause on as to why the case should not be dismissed.

5. On April 4, 1990, attorney A. Camp Bonds, Jr. appeared before this Court, stating that he was not representing the Debtor, but informed the Court that a Petition for Rehearing had been filed with the Tenth Circuit. As a result, this Court allowed the Debtor to June 1, 1990 to file a Status Report, for the purpose of updating the status of the Petition for Rehearing.

6. On June 1, 1990, this Court received a timely Status Report from the last known counsel for the Debtor, Mr. Timothy T. Trump. Said Status Report states that counsel has been unable to contact the principals of the Debtor-in-Possession. Also, counsel sets forth that, based upon the conversations with Mr. Bonds, it is his understanding that a Petition for Certiorari is pending before the Court, with the Motion for Rehearing to the Tenth Circuit having been denied. Finally, the Status Report states that "Counsel cannot commit as to whether or not the Debtor intends to file a plan of reorganization or when and if such plan of reorganization might be filed. Counsel has no present intention to file such a plan or disclosure statement on behalf of the Debtor."

As a result of the Status Report, this Court finds that the lack of participation in this bankruptcy proceeding by the Debtor-in-Possession has imposed an "unreasonable delay by the debtor that is prejudicial to creditors." 11 U.S.C. §1112(b)(3). Also, the Debtor has failed to propose a Plan within the time prescribed by this Court [11 U.S.C. §1112(b)(4)] and has demonstrated an inability to effectuate a Plan. 11 U.S.C. §1112(b)(2). For these reasons, this case must be dismissed.

IT IS THEREFORE ORDERED that the above-referenced case  
be dismissed for the reasons set forth herein.

The Clerk is instructed to close this file.

s/ James E. Ryan

JAMES E. RYAN  
United States Bankruptcy Judge

**APPENDIX B**

Oklahoma Uniform Tax Procedure Code, Okla. Stat. tit. 68 (1981):

**§201. Purpose of article**

The purpose of this article, which may be cited as the "Uniform Tax Procedure Code", is to provide, so far as is possible, uniform procedures and remedies with respect to all state taxes. Unless otherwise expressly provided in any state tax law, heretofore or hereafter enacted, the provisions of this article shall control and shall be exclusive.

**§207. Hearings by Tax Commission**

(a) Incidental to the performance of its duties in the administration of this article or any state tax law, any member of the Tax Commission shall have the power to administer oaths, conduct hearings, and compel by subpoena the attendance of witnesses and the production of any books, records, or papers of any person, firm, or corporation. The Tax Commission may examine under oath any taxpayer, and the directors, officers, agents and employees of any taxpayer, as well as all other witnesses, relative to the business of such taxpayer in respect of any matter incident to the administration of this article or any state tax law.

(b) The fees of witnesses required by the Tax Commission to attend any hearing shall be the same as those allowed to witnesses appearing before district courts of this state. Such fees shall be paid in the manner provided for the payment of other expenses incident to the administration of this article or of any state tax law.

(c) Any person desiring a hearing before the Tax Commission shall file an application for such hearing, signed by himself or his duly authorized agent, setting out therein:

(1) A statement of the nature of the tax, the amount thereof in

controversy, and the action of the Tax Commission complained of;

(2) A clear and concise assignment of each error alleged to have been committed by the Tax Commission;

(3) The argument and legal authority upon which each assignment of error is made; provided, that the applicant shall not be bound or restricted in such hearing, or on appeal, to the arguments and legal authorities contained and cited in said application;

(4) A statement of the relief sought by the taxpayer;

(5) A statement of the witnesses, so far as such witnesses are then known to the taxpayer, showing their names and addresses, and, if the taxpayer so desires, a request that such witnesses be subpoenaed;

(6) A verification by such person, or his duly authorized agent, that the statements and facts therein contained are true.

(d) If, in such application, the taxpayer shall request an oral hearing, the Tax Commission shall grant such hearing and shall, by written notice, advise the taxpayer of a date, which shall not be less than ten (10) days from the date of mailing such written notice, when such taxpayer may appear before the Tax Commission and present argument and evidence, oral or written. The Tax Commission shall, as soon as practicable thereafter, hold a hearing upon the matter and, pursuant to such hearing, shall, as soon as practicable, make an order confirming, modifying or vacating its prior determination, and shall send to the parties appearing before it at such hearing immediately a copy of such order.

## **§221. Reports or returns by taxpayer**

(a) If any taxpayer shall fail to make any report or return as required by any state tax law, the Tax Commission, from any information in its possession or obtainable by it, may determine the correct amount of tax for the taxable period. If a report or return has been filed, the Tax Commission shall examine such report or return

and make such audit or investigation as it may deem necessary. If, in cases where no report or return has been filed, the Tax Commission determines that there is a tax due for the taxable period, or if, in cases where a report or return has been filed, the Tax Commission shall determine that the tax disclosed by such report or return is less than the tax disclosed by its examination, it shall in writing propose the assessment of taxes or additional taxes, as the case may be, and shall mail a copy of the proposed assessment to the taxpayer at his last-known address. Proposed assessments made in the name of the "Oklahoma Tax Commission" by its authorized agents shall be considered as the action of the Tax Commission.

(b) Any assessment, correction or adjustment made as a result of an office audit shall be presumed to be the result of an audit of the report or return only, and such office audit shall not be deemed a verification of any item in said report or return unless said item shall have been made the subject of a hearing before the Tax Commission, and the correctness and amount of such item determined at such hearing; and such office audit shall not preclude the Tax Commission from subsequently making further adjustment, correction or assessment as a result of a field audit of the books and records of the taxpayer, wherever located, or upon disclosures from any source other than the return. In cases where no report or return has been filed, the assessment of the tax on any information available shall in no event preclude the assessment at any time on subsequently disclosed information.

(c) Within thirty (30) days after the mailing of the aforesaid proposed assessment, the taxpayer may file with the Tax Commission a written protest under oath, signed by himself or his duly-authorized agent, setting out therein:

(1) A statement of the amount of deficiency as determined by the Tax Commission, the nature of the tax and the amount thereof in controversy;

(2) A clear and concise assignment of each error alleged to have been committed by the Tax Commission;

(3) The argument and legal authority upon which each assignment of error is made; provided, that the applicant shall not be bound or restricted in such hearing, or on appeal, to the arguments and legal authorities contained and cited in said application;

(4) A statement of relief sought by the taxpayer; and

(5) A verification by the taxpayer or his duly authorized agent that the statements and facts contained therein are true.

(d) If in such written protest the taxpayer shall request an oral hearing, the Tax Commission shall grant such hearing, and shall, by written notice, advise the taxpayer of a date, which shall not be less than ten (10) days from the date of mailing of such written notice, when such taxpayer may appear before the Tax Commission and present arguments and evidence, oral or written, in support of his protest. Hearing shall be held as soon as practicable. In the event an oral hearing is not requested, the Tax Commission shall proceed without further notice to examine into the merits of the protest and enter an order in accordance with its findings.

(e) If the taxpayer fails to file a written protest within the thirty-day period herein provided for or within the period as extended by the Commission, then the proposed assessment, without further action of the Tax Commission, shall become final and absolute at the expiration of thirty (30) days from the date same is mailed to the taxpayer or at the expiration of the period as extended by the Tax Commission.

(f) The Tax Commission may in its discretion extend the time for filing a protest for any period of time not to exceed an additional ninety (90) days.

(g) Within a reasonable time after the hearing herein provided for, the Tax Commission shall make and enter an order in writing in which it shall set forth the disposition made of the protest and a copy of such order shall forthwith be mailed to the taxpayer. The taxpayer may within the time and in the manner provided for by Section 225 of this Code, appeal to the Supreme Court, but in the event he fails to so

proceed, the order shall within thirty (30) days from the date a certified copy thereof is mailed to the taxpayer, become final. The provisions of Section 226 of this Code, shall not apply where a proposed assessment or an assessment of taxes has been permitted to become final.

(h) In all instances where the proposed assessment or the assessment of taxes or additional taxes has been permitted to become final, a certified copy of the assessment may be filed in the office of the court clerk of any county in this state, and upon being so filed, the court clerk shall enter same upon the judgment docket in the same manner as provided for in connection with judgments of district courts. When an assessment is so filed and docketed, it shall have the same force and be subject to the same law as a judgment of the district court, and accordingly it shall constitute a lien on any real estate of the taxpayer located in the county wherein filed; and execution may issue and proceedings in aid of execution may be had the same as on judgments of district courts. The remedies provided in this paragraph shall be in addition to other remedies provided by law.

(i) In order to make more definite the intention of the Legislature in connection with the applicability or lack of applicability of the refund provisions of the tax statutes to those treating with proposed assessments and assessments that have become final, the Legislature being cognizant of the fact that such intent has been questioned, it is declared to be the intent of the Legislature that said refund provisions shall be without application to taxes where the amount thereof has been determined by an assessment, other than an assessment designated as an "office audit," that has become final.

### **§225. Appeals**

(a) Any taxpayer aggrieved by any order, ruling, or finding of the Tax Commission directly affecting such taxpayer may appeal therefrom directly to the Supreme Court of Oklahoma. A taxpayer so desiring to appeal shall, within ten (10) days from the date of mailing to the taxpayer of any such order, ruling, or finding, file with the Tax Commission a written notice of his intention to appeal.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling, or finding complained of, the taxpayer desiring to appeal shall file in the office of the Clerk of the Supreme Court a petition in error specifying the grounds upon which such appeal is based. At the same time the taxpayer shall request that the Tax Commission prepare for filing with the Supreme Court, within thirty (30) days, the record of the appeal, certified to by the Secretary of the Tax Commission, and consisting of any citations, findings, judgments, motions, orders, pleadings and rulings, together with a transcript of all evidence introduced at any hearing relative thereto, or such portion of such citations, findings, judgments, motions, orders, pleadings, rulings, and evidence as the appealing parties and the Tax Commission may agree to be sufficient to present fully to the Court the questions involved. Upon request of the taxpayer, the Tax Commission shall furnish him a copy of the proceedings had in connection with the matter complained of.

(c) As a condition precedent to the right of the taxpayer to prosecute such an appeal, and as a jurisdictional prerequisite of the Supreme Court to entertain such appeal, it is specifically provided that, if the appeal be from an order, judgment, finding, or ruling of the Tax Commission assessing a tax or an additional tax, penalties, and interest, the taxpayer shall pay to the Tax Commission the amounts assessed. If, upon a final determination of the appeal the order assessing such tax, penalties, and interest is reversed or modified and it is determined that said tax or part thereof was erroneously or illegally assessed, said amounts so paid by the taxpayer, together with the interest thereon at the rate of three percent (3%) per annum, shall be refunded to the taxpayer by the Tax Commission.

(d) Such refunds and interest thereon shall be paid by the Tax Commission out of monies in the Tax Commission clearing account from subsequent collections from the same source as the original tax assessment, provided that in the event there are insufficient funds for refunds from subsequent collections from the same source, the refund shall be paid by the Tax Commission from monies appropriated by the Legislature to the special refund reserve account for such purposes as hereinafter provided. There is hereby created within the official

depository of the State Treasury an agency special account for the Tax Commission for the purpose of making such refunds as may be required under this section, not otherwise provided. This account shall consist of monies appropriated by the Legislature for the purpose of making refunds under this section.

(e) In lieu of the cash payment provided for in the preceding paragraph, the taxpayer may file with the Tax Commission a bond in double the amount of the tax, additional tax, penalties and interest so assessed, conditioned that he will faithfully and diligently prosecute such appeal to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, will pay such tax, additional tax, penalties and interest, and costs so assessed against him.

(f) If the appeal be from an order, judgment, finding or ruling of the Tax Commission other than one assessing a tax and from which a right of appeal is not otherwise specifically provided for in this article, any aggrieved taxpayer may appeal from any such order, judgment, finding or ruling as provided in this section and may supersede the effect of such order, judgment, ruling or finding by filing with the Tax Commission a bond in an amount fixed by the Tax Commission payable to the State of Oklahoma conditioned that such appeal will faithfully and diligently be prosecuted to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, that such person will immediately conform thereto.

(g) This section shall be construed to provide to the taxpayer a legal remedy by action at law in any case where a tax, or the method of collection or enforcement thereof, or any order, ruling, finding or judgment of the Tax Commission is complained of, or is sought to be enjoined in any action in any court of this state or the United States of America.

**§226. Action to recover taxes as additional remedy to aggrieved taxpayer**

(a) In addition to the right of appeal to the Supreme Court provided for in the preceding section, a right of action is hereby created to afford a remedy to any taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling or finding of the Tax Commission, any such taxpayer shall pay the tax to the Tax Commission, and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. If the taxpayer prevails the Tax Commission shall, by cash voucher drawn by the Tax Commission upon its official depository clearing account or special refund reserve account with the State Treasurer, refund to the taxpayer the amount of tax determined not to be due pursuant to the final judgment of the court having jurisdiction, together with interest on such amount at the rate of three percent (3%) per annum from the date of payment by the taxpayer to the date of the court's final order. The refunds paid shall be payable as provided in Section 225(d).

(c) This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the Courts of the United States. In all actions brought hereunder service of process upon the Chairman of the Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not be a necessary or proper party thereto.

(d) Upon request of any taxpayer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the courts for judicial determination, the taxpayer,

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upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit.

